

General Information Letter: It is possible that both Illinois law and the law of another state will require withholding from the same compensation.

July 13, 2001

Dear:

This is in response to your letter dated June 20, 2001 in which you request information regarding Illinois income tax withholding requirements. The nature of your request and the information you have provided require that we respond with a General Information Letter (GIL). A GIL is designed to provide general information, is not a statement of Department policy and is not binding on the Department, See 86 Ill. Adm. Code 1200.120(b) and (c), which may be found on the Department's website at [www.revenue.state.il.us](http://www.revenue.state.il.us).

In your letter you have stated the following:

I am employed with xxxxxxxxxxxxxxxx as a Fire Protection Sprinkler Designer and am a resident of xxxxxxxx, IL. My office is based in xxxxxxxx, MO but I design various jobs in Illinois and Missouri. On June 1<sup>st</sup> when I received my weekly paycheck I noticed that my state withholding had doubled.

I informed our Corporate Tax Department and was told by xxxxxxxxxxxxxxxx, CPP that a new law had been passed requiring xxxxxxxxxxxxxxxx to tax me in the state I worked and the state I lived in, since there is a nexus condition involved. I informed her that I didn't want the Illinois State tax withheld from my check and she informed me that I have no choice.

After further investigation I called xxxxx back to inform her of some new information that I had found, via the Illinois Department of Revenue website, and she changed her story to how this had also been a law and how they were changing their accounting practices to accommodate the withholding of taxes in both states.

I then contacted Jennifer Schwitek, Revenue Tax Specialist, via email and she was very helpful in giving me direction. After receiving a very informative email from Jennifer, I emailed it to xxxxx for her review. She emailed me back stating that xxxxxxxxxxxxxxxx was correct in their withholding practice and that I need to drop the issue. I also discovered that portions of my wages are being reported to Missouri and a portion to Illinois. When I inquired to xxxxx about this she became defensive stating that I need not concern myself. My concern is that this is being done wrong and at the end of the year I'll have a complete mess to contend with when it comes to filing my income tax. In the 1999 tax year I end up with 10 different W-2's and had to pay an accountant to shift through it all. I also do not understand why I am the only employee who this is happening to. We have at least three other employees who live in Illinois and they laugh when I tell them the situation saying that xxxxxxxxxxxxxxxx can not do that.

Please help me with any legal information and/or assistance concerning this matter and feel free to reach me for any further questions at (xxx) xxxxxxxx ext. xxx.

## **RESPONSE**

Section 701 of the Illinois Income Tax Act ("the IITA"; 35 ILCS 5/101 *et seq.*) sets forth the requirements relating to an employer's withholding of Illinois income tax. Subsections (a) and (b) of that section state as follows:

- (a) In General. Every employer maintaining an office or transacting business within this State and required under the provisions of the Internal Revenue Code to withhold a tax on:
- (1) compensation paid in this State (as determined under Section 304(a)(2)(B)) to an individual; or
  - (2) payments described in subsection (b) shall deduct and withhold from such compensation for each payroll period (as defined in Section 3401 of the Internal Revenue Code) an amount equal to the amount by which such individual's compensation exceeds the proportionate part of this withholding exemption (computed as provided in Section 702) attributable to the payroll period for which such compensation is payable multiplied by a percentage equal to the percentage tax rate for individuals provided in subsection (b) of Section 201.
- (b) Payment to Residents. Any payment (including compensation) to a resident by a payor maintaining an office or transacting business within this State and on which withholding of tax is required under the provisions of the Internal Revenue Code shall be deemed to be compensation paid in this State by an employer to an employee for the purposes of Article 7 and Section 601(b)(1) to the extent such payment is included in the recipient's base income and not subjected to withholding by another state.

Department of Revenue Regulations section 100.7010(a)(1) provides that if withholding is required under the above rules, then the entire amount of such compensation is subject to withholding.

Pursuant to IITA section 304(a)(2)(B), compensation is paid in this State if:

- (1) The individual's service is performed entirely within this State;
- (2) The individual's service is performed both within and without this State, but the service performed without this State is incidental to the individual's service performed within this State; or
- (3) Some of the service is performed within this State and either the base of operations, or if there is no base of operations, the place from which the service is directed or controlled is within this State, or the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.

In applying IITA section 304(a)(2)(B), Department of Revenue Regulations section 100.7010(a)(3) provides that rules set forth therein "are to be applied in such manner that, if they were in effect in other states, an item of compensation would constitute 'compensation paid in' only one state. Thus, if an item would, under these rules, constitute compensation paid in a state other than Illinois because the individual's service was localized in such other state under the tests of [section 302(a)(2)(B)(1)] above, it could not also be compensation paid in Illinois.

Pursuant to the statutory provisions and regulations cited above, Illinois law requires an employer maintaining an office or transacting business in Illinois to withhold Illinois income tax with respect to any item of compensation paid in this State as determined under IITA section 304(a)(2)(B). Moreover, even if an item of compensation is not considered compensation paid in this state under section 304(a)(2)(B), it will be deemed compensation paid in this State to the extent it is included in the base

income of an Illinois resident, is subject to federal income tax withholding, and is not subjected to withholding by another state.

In addition, Illinois law does not allow an item of compensation to be proportionately allocated for withholding purposes between two or more states in which an employee performs services. Except in the case of certain professional athletes, an item of compensation is either subject entirely to Illinois income tax withholding, or is not subject at all. Still, it is possible that certain compensation may be subject to withholding in Illinois and one or more other states. For example, an item of compensation may constitute "compensation paid in this State" under IITA section 304(a)(2)(B) and thus subject to withholding under section 701, and at the same time be subject to withholding in another state according to such other state's laws. However, under Department of Revenue Regulations section 100.7010(a)(3), application of Illinois' rules alone may not result in a determination that an item of compensation constitutes compensation paid in two or more states. Therefore, if as a result of applying the rules of section 304(a)(2)(B), an item of compensation is determined paid in another state, such item cannot also be considered paid in Illinois.

In your case, then, your entire compensation will be subject to Illinois income tax withholding to the extent that it is determined to be compensation paid in this State under IITA section 304(a)(2)(B). On the other hand, if under the rules of section 304(a)(2)(B) it is determined that your compensation is paid in Missouri or another state, then it is not subject to Illinois income tax withholding. In any event, an item of your compensation should not be apportioned for withholding purposes between Illinois and Missouri on the basis that your services with respect to that item were performed partly in Illinois and partly in Missouri. As indicated above, except with respect to certain professional athletes, an item of compensation is either considered paid in this State and thus subject entirely to Illinois withholding, or it is considered paid in another state and thus not subject at all to Illinois withholding. Finally, because you are a resident, your compensation may be deemed compensation paid in this State to the extent included in base income and not subjected to withholding by another state. Whether your compensation is subject to withholding of Missouri income tax depends upon the laws of Missouri.

Enclosed please find a copy of Department of Revenue Regulations section 100.7010 detailing the rules with examples for determining whether compensation is paid in this State. Other provisions of the Regulations have been enclosed for your convenience.

As stated above, this is a GIL which does not constitute a statement of policy that applies, interprets or prescribes the tax laws, and it is not binding on the Department. If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items one through eight of 86 Ill. Adm. Code 1200.110(b). If you have additional questions regarding this GIL, you may contact me at (217) 782-7055.

Sincerely,

Brian L. Stocker  
Staff Attorney (Income Tax)